IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 25 OF 2007

Ark Shipping Co. Ltd.
having its office at
8th Floor, Hanyoung Building,
57-9, Sesomun-Dong,
Chung-Gu, Seoul,
Korea. ... Petitioners.

V/s.

GRT Shipmanagement Pvt. Ltd.
having its office at
606/7, 6th Floor, B-Wing,
Sagar Technic Park,
Andheri-Kurla Link Road,
Mumbai-400 073. ... Respondents.

Mr. Vishal Seth i/by R.A.Fernandes for the petitioners.

Mr. Kamal Khata with Ms. Kaniz Munji i/by Motiwala and Co. for the respondents.

CORAM : ANOOP V. MOHTA,J.

DATED : 26th July, 2007.

JUDGMENT:-

The petitioners have invoked Part II and specially Section 45 to 48 of the Arbitration and

Conciliation Act-1996, (for short, "Arbitration Act-1996) to enforce the foreign award dated 29th August, 2005 and 9th October, 2006 made and published in Singapore.

. The facts are:-

2. The respondents, some time in February, 2004, entered into negotiations with the petitioners through broker for the purposes of chartering a vessel for carriage of cargo in several shipments from ports in Indonesia to ports in India.

3. A signed recap dated 22nd March, 2004 executed by the parties containing main terms of the contract. However, it was conditional upon lifting of "subjects". The respondents on 22nd March, 2004 lift all subjects and thereby confirm the fixtures/ contract. Between 22nd to 25th March, 2004, various emails were exchanged between the parties through brokers to confirm the terms of the contract in accordance with the proforma charter party.

4. Some time in March, 2004, the respondents attempted to back out of their contractual

obligations. The petitioners on account of the breach committed by the respondents, suffer losses. The petitioners, therefore, on 5th May, 2004 invoked the arbitration in Singapore and appointed Mr.Andrew Bicknell, as an Arbitrator for resolution of disputes arising out of the contract. The preliminary award was made and published by the Arbitrator on 29th August, 2005. The final award has been made and published by the Arbitrator on 9th October, 2006, of US$ 580294.69, together with interest thereon at the rate of 6% and costs.

5. The petitioners, thereafter, by invoking the Arbitration Act, have filed the present petition on 8th December, 2006, based upon the print outs taken out from the computer being the original agreement for Arbitration as contemplated under Section 47 of the Arbitration Act, 1996 and Rule 803(C) of the High Court of Judicature at Bombay, Original Side Rules-1980. Those print outs are nothing but the xerox copies of the email exchanged between the parties based upon which all the terms and conditions of agreement have been finalized and accepted by the parties.

6. The learned counsel appearing for the respondents, therefore, initially raised objection that such petition is not maintainable for want of original or certified copy of the agreement for Arbitration. At that time, there was no original agreement and or certified copy of the agreement for Arbitration was filed, alongwith the petition. The office of the High Court has also not treated Exhibit A to A4 as originals as those are the copies of the print outs. Therefore, by order dated 20th April, 2007, this Court has granted the petitioners time to remove the objection and to file certified copy of the original agreement for Arbitration or certified copy of the agreement as contemplated.

7. The petitioners, therefore, have filed an affidavit dated 3rd May, 2007 alongwith hard/ printed copies of the print outs/ emails duly certified by the concerned officer/employees, which read as under:-

"1. I state that I was employed in the chartering division of Sahi Oretrans (Pvt) Ltd. (hereinafter for the sake of brevity referred to as Sahi), a company having its office at 30 Western India House, 3rd Floor, Sir. P.M.Road, Mumbai 400 001. I state that

Sahi acted as the ship broker in respect of the charter-party concluded between the petitioners and respondents, abovenamed.

2. I state that being employed in the chartering division of Sahi, I was personally involved in the transaction. I state that being ship brokers all emails were forwarded to the petitioners and the respondents through computer terminals in Sahi’s office, by me. In fact, my name appears in almost all the email correspondence.

3. I state that by virtue of my employment I was authorized to use the computer terminals in Sahi’s office. Further, the computer terminals used by me were functioning normally at all times. Further, since I was personally involved in the transaction, I in fact personally authored/saw the email correspondence exchanged between the petitioners and the respondents.

4. I hereby produce hard copies of the emails which represent the contract entered into between the parties. The said emails are annexed hereto as Exhibit "A". I crave leave to refer to and rely upon

typed/clear copies of the same at the time of hearing, if necessary.

5. I confirm that the contents of the hard copies of the emails are identical to the emails exchanged through the computer terminals operated by me. I further state and confirm that the contents of the hard copies of the emails at Exhibit "A" are identical to the hard copies of the emails filed before the arbitrator, a compilation of which I have perused.

6. Accordingly, I am making this present affidavit to certify that the hard copies of the emails annexed at Exhibit "A" to "A4" hereto are a "true copy"/ reproduction of the electronic record which was regularly fed into/transmitted through my computer terminal in Sahi's office in the ordinary course of activities. I further state that at all times the computer terminals utilized by me were operating properly and there is no distortion in the accuracy of the contents of the hard copies of the emails."

8. The above affidavit, therefore, in the facts and circumstances of the case, is sufficient compliance of Section 65-B of the Evidence Act. The above hard

copies/ print outs as taken out from the computer, therefore, can be treated as certified copy of agreement for Arbitration, as contemplated under the Arbitration Act-1996. These correspondence/ documents, therefore, as contended by the petitioners, and as also relied by the Tribunal at Singapore, while passing interim final award arising out of the disputes based upon this agreement, therefore, are in compliance of the provisions. The office has also endorsed the remark "as Certified original print out" as stated on oath may be treated as original after obtaining directions from the Court".

9. The learned counsel appearing for the respondents have also no objection and conceded that these are the certified hard copies of the emails, based upon which the Tribunal at Singapore has passed the impugned awards.

10. The respondents have filed reply and have opposed the present petition mainly on the ground that; there is no concluded contract or agreement between the parties. Based upon above documents A to A4 as relied by the petitioners, there was no question of settlement of disputes through the Arbitral Tribunal

in question. He further contended that such foreign award based on such emails/ print outs are unenforceable in India. The petition, therefore, liable to be rejected for want of basic concluded contract or agreement, apart from the agreement for Arbitration.

11. Admittedly, there is a clause for arbitration as reproduced on page 16 of the petition. It is also on page 5 of the affidavit dated 04/05/2007 filed by the petitioners which reads as under:-

> . "GENERAL AVERAGE/ ARBITRATION SHALL BE ADJUSTED/ SETTLED IN INDIA AND ENGLISH LAW TO APPLY."

12. The parties have appeared before the Tribunal and have raised the preliminary issues about the jurisdiction to entertain and to try the dispute between the parties. The preliminary issues were:-

1. Whether the Arbitral Tribunal has substantive jurisdiction in the above matter?

2. Whether the concluded agreement was

made between the claimants and the respondents and it is so?

3. Whether the concluded agreement contained a valid agreement to arbitrate disputes in Singapore pursuing to English Law on LMAA terms or alternatively, or whether title 9 of the United States Code applies?

4. Whether the Tribunals appointed as sole arbitrator is valid?

13. The Tribunal, thereafter, considering the rival contentions as raised by the parties based upon the material available on the record, held all the issues as referred above in the affirmative by order dated 29th August, 2005. By further order dated 9th October, 2006, the Tribunal has passed the final award. This final award is the subject matter of the present petition.

14. There is nothing on record to show that against these orders/ awards dated 29th August, 2005 and 9th October, 2006, the respondents have preferred any

appeal and/or any appeal is still pending. On the contrary, there is a clear affidavit filed on record, that as the respondents failed to file appeal against those orders within 28 days and, therefore, as required and which expired on 26th September, 2005 and 30th November, 2006 respectively, these awards as made and published became final and unappealable under the laws of Republic of Singapore. There is no dispute that the said Arbitration was conducted in Singapore and is also governed by the provisions of the Arbitration Act (Chapter 10) of the Republic of Singapore. The respondents, in their reply also not controverted these facts about the finality of above two awards. Therefore, the fact remains that these two awards have attained finality.

15. The basic submission, therefore, that there was no contract between the parties and no agreement for Arbitration. Having once rejected by the Tribunal and as respondents failed to challenge those findings, I am of the view that, the respondents cannot re-agitate such issues in reply in this petition, filed by the petitioner under the Arbitration Act-1996, for enforcement of such Foreign Awards.

16. As noted above, though grounds as raised in the present petition based on Section 48 are similar to the grounds of Section 34 of the Arbitration Act, in my view, in the facts and circumstances of the present case, where the grounds specially in reference to the existence of Arbitration agreement and their clauses have already been decided by the Tribunal and against which no appeal is preferred by the respondents allowing the respondents to re-agitate the same issue and to challenge the said foreign award as contemplated under Section 34 of the Arbitration Act, as contended by the learned counsel appearing for the petitioners is impermissible.

17. Considering the reasoning given by the Tribunal I find that the impugned award as passed by, is not contrary to the public policy in India. The said award is enforceable in India. The reference of subject matter is capable under the law of India. There is no case of fraud or corruption raised before the Tribunal and or even before this Court. There was no incapacity which the parties have subjected the agreement between the parties as invalid. There was full opportunity given to the parties on all stages including the appointment of arbitrator till the

hearing of the matter by the Tribunal. The disputes/difference clause within the ambit of the terms of the arbitration. The computation of arbitral tribunal was within the framework of arbitration and as apart from that the agreement or clauses of Arbitration is in accordance with law of the country, where the arbitration took place. Though it is an interim awards, it became binding on the parties as are not set aside or suspended by any appellate Court under the law in which the awards have been passed.

18. Therefore, in view of this and considering the commercial transaction between the parties and the scheme and object of the Arbitration Act, there is no reason that this Court should not respect such foreign award which is in all respect enforceable in India.

19. The respondents have relied on the following authorities:-

1. **U.P.Rajkiya Nirman Nigam Ltd. Vs. Indure Pvt. Ltd., reported in AIR 1996 SC 1373.**
2. **Smita Conductors Ltd. Versus Euro Alloys Ltd. reported in (2002) 7 Supreme Court Cases 728.**
3. **Jindal Drugs Ltd. Versus Noy Vallesina Engineering SPA & Ors. reported in 2002 (3) Bom. C.R. 554.**

4. **Pramod Chimanbai Patel versus Lalit Construction & Another reported in 2002 (6) Bom. C.R.72.**

5. **Nirav Securities Pvt. Ltd. versus Prabhuta Motiram Adhvaryu reported in 2002 (6) Bom. C.R.745.**

6. **A.Mohammed Basheer Versus State of Kerala & Ors. reported in (2003) 6 Supreme Court Cases 159.**

7. **Sekhsaria Exports versus Union of India & Ors. reported in 2003 (Supp.2) Bom. C.R.480.**

8. **United Bank of India versus Ramdas Mahadeo Prashad and Others reported in (2004) 1 Supreme Court Cases 252.**

9. **Dresser Rand S.A. versus Bindal Agro Chem. Ltd. & Ors. reported in (2006) 1 Supreme Court Cases 751.**

20. The learned counsel appearing for the petitioner has relied on **Smita Conductors Ltd. Vs. Euro Alloys Ltd, (2002)7 SCC 728 in support of his submission.**

21. The submission that, there was no binding agreement and or concluded contract between the parties based upon the above judgments, is unacceptable. The facts and circumstances of those cases are totally distinct and distinguishable. There was no such case, similar to the present one, where the Tribunal has concluded the issue about the existing agreement between the parties and passed the

interim awards which became final.

22. A strong reliance has been placed on the Judgment of **Jindal Drugs Limited (supra)** by the learned counsel appearing for the petitioners, and contended that the respondents can agitate all the issues as contemplated under Section 48 and 49 of the Arbitration Act, on the grounds as available under Section 34 of the Act. The facts in that case are totally different, as the petitioners there, had challenged the foreign award itself under Section 34 of the Arbitration Act and subsequently by amendment, added Section 48 of the Arbitration Act. In the present case the place of Arbitration is at Singapore. The English Law has been made applicable. The remedy of challenging the Arbitral award under Section 34 of the Arbitration Act is not available to the respondents. In the present case, there is admittedly, no such challenge made to the awards under Section 34 of the Arbitration Act.

23. All the Judgments as cited by the learned counsel appearing for the petitioners are in reference to the submission of non-existence of any binding and valid agreement between the parties. As noted above, the Tribunal has already rejected this preliminary

submission and pass the interim awards which remained final, I am not inclined to consider the submission raised by the learned counsel appearing for the petitioners that such issue can be re-agitated before this Court in India again in such petition. There is nothing in the Arbitration Act-1996 which gives the power to the Indian Courts to set aside the foreign arbitral award or sit over the decision concluded by the Tribunal based on the provisions of the Arbitration Act about the existence of the agreement. Sections 45 to 49 of the Arbitration Act-1996 need to consider from the point of view of enforceability of the foreign award and further, where such foreign award is enforceable in India or not. The challenge to the enforceability, no way can be equated to the challenge to the merit of the interim awards passed by the foreign tribunal on the foundation of the existence of valid and binding agreement between the parties.

24. Therefore, taking all this into account, the objection as raised by the learned counsel appearing for the respondents are rejected.

25. Resultantly, the petition is allowed in terms of

prayer Clause (a). Prayer Clause (a) reads thus:-

> (a) The Hon’ble Court be pleased to declare the arbitration award dated 9th October, 2006 enforceable as a decree of this Hon’ble Court.

26. No costs.

[ANOOP V. MOHTA, J.]